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IN THE

Supreme Court of the United States

October Term, 1975

No. 75-312

COLEMAN A. YOUNG,
Mayor of the City of Detroit, *et al.*,
Petitioners,

v.

AMERICAN MINI THEATRES, INC. and
PUSSY CAT THEATRES OF MICHIGAN, INC.,
Respondents.

COLEMAN A. YOUNG,
Mayor of the City of Detroit, *et al.*,
Petitioners,

v.

NORTOWN THEATRE, INC.,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SIXTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF OF MOTION PICTURE ASSOCIATION OF AMERICA, INC. AS *AMICUS CURIAE*

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Respondent.

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

Motion Picture Association of America, Inc. hereby respectfully moves for leave to file as *amicus curiae* in these cases the Brief appended hereto. The consent of

counsel for Respondent Nortown Theatre, Inc. has been obtained by letter dated December 2, 1975, and the consent of counsel for Respondents American Mini Theatres, Inc. and Pussy Cat Theatres of Michigan, Inc. has been obtained by letter dated December 18, 1975. On December 2, 1975, movant wrote to counsel for Petitioners, who denied consent by letter dated December 4, 1975. (Copies of all four letters are being filed with the Clerk of this Court simultaneously with the filing of this Motion and appended Brief *amicus curiae*.)

Motion Picture Association of America, Inc. ("MPAA") is a trade association whose membership comprises companies which are among the largest producers and/or distributors of motion pictures in the United States, including:

Allied Artists Pictures Corporation
Avco Embassy Pictures Corp.
Columbia Pictures Industries, Inc.
Metro-Goldwyn-Mayer Inc.
Paramount Pictures Corporation
Twentieth Century-Fox Film Corp.
United Artists Corporation
Universal Pictures, a division of
Universal City Studios, Inc.
Warner Bros. Inc.

The instant cases raise two questions which are of significance to the entire motion picture industry. These are: (1) the constitutionality of the specific Detroit ordinance under review, and (2) the general constitutional considerations which govern attempts to limit the exhibition of certain motion pictures to certain locales by means of what is commonly referred to as "the zoning approach." Any decision by this Court on these questions will vitally effect

the constitutional interests of MPAA's member companies, as well as all other producers, distributors and exhibitor of motion pictures in the United States.

Because MPAA believes that the issues raised in these cases are of vital concern to the entire motion picture industry, including its member companies, it respectfully moves for leave to file as *amicus curiae* the Brief appended hereto.

Respectfully submitted,

SIDNEY SCHREIBER
BARBARA SCOTT
JAMES BOURAS
Attorneys for Motion Picture Association of America, Inc.

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BRIEF OF MOTION PICTURE ASSOCIATION OF AMERICA, INC. AS *AMICUS CURIAE*

Interest of the *Amicus*

The interest of the *Amicus* is set forth in the Motion for Leave to File this Brief, *supra*.

ARGUMENT

The Detroit ordinance's definition of the "adult" motion picture threatres to which it applies is constitutionally overinclusive in some respects and constitutionally underinclusive in others, and is therefore invalid on its face.

These cases present for consideration by this Court yet another facet of a field of law which the late Justice Harlan accurately characterized as "intractable." *Interstate Circuit* v. *Dallas*, 390 U.S. 676, 704 (1968) (concurring and dissenting opinion).

At issue here is one of a few recent measures which limit, in various ways, the locales in which certain kinds of non-obscene motion pictures, books and other forms of communication may be exhibited or sold. Such measures, commonly referred to in the generic sense as "the zoning approach," are *not* predicated upon traditional, content-neutral zoning considerations. Nor do they deal narrowly with those specific instances in which minors or unwilling adults are exposed to the content of the material itself. Cf. *Ginsberg* v. *New York*, 390 U.S. 629 (1968); *Redrup* v. *New York*, 386 U.S. 767, 769 (1967) (*per curiam*). Rather, such measures are predicated upon assumptions that, for various reasons, the presence of motion picture theatres and bookstores offering certain kinds of non-obscene material should be prohibited in certain otherwise appropriate locales.

In 1972, through a series of amendments to existing zoning provisions, the City of Detroit included "Adult Book Store[s]," "Adult Motion Picture Theater[s]" and "Adult Mini Motion Picture Theater[s]" in a category called "Regulated Uses," no more than two of which uses may be located within 1,000 feet of each other. This category also includes establishments in which alcoholic beverages are sold for consumption on the premises (e.g., restaurants and bars), hotels and motels, pawnshops, pool halls, public lodging houses, shoeshine parlors and "taxi" dance halls.

An "Adult Motion Picture Theater" is defined as "[a]n enclosed building with a capacity of 50 or more persons used for presenting material distinguished or characterized by an emphasis on matter depicting, describing or relating to 'Specified Sexual Activities' or 'Specified Anatomical Areas'... for observation by patrons therein."[1]

The term "Specified Sexual Activities" is defined to mean:

> "1. Human Genitals in a state of sexual stimulation or arousal;
>
> "2. Acts of human masturbation, sexual intercourse or sodomy;
>
> "3. Fondling or other erotic touching of human genitals, pubic region, buttock or female breast."[2]

The term "Specified Anatomical Areas" is defined to mean:

> "1. Less than completely and opaquely covered: (a) human genitals, pubic region, (b) buttock, and (c) female breast below a point immediately above the top of the areola; and
>
> "2. Human male genitals in a discernibly turgid state, even if completely and opaquely covered."[3]

---

[1] Petition for Certiorari, Appendix G, page 66. (The terms "Adult Book Store" and "Adult Mini Motion Picture Theater" are similarly defined. For the sake of simplicity, we have referred in the text of this Brief only to adult motion picture theatres; however, our use of this terminology should be understood to include adult bookstores and adult "mini" motion picture theatres as well.)

[2] *Ibid.*

[3] *Id.* at 66-67.

In these actions challenging on its face the constitutionality of the provision which included adult motion picture theatres among the "Regulated Uses" whose locations in the City of Detroit are limited, the District Court upheld the provision, *Nortown Theatre Incorporated* v. *Gribbs,* 373 F.Supp. 363 (E.D.Mich. 1974),[4] but the Court of Appeals invalidated it. *American Mini Theatres, Inc.* v. *Gribbs,* 518 F.2d 1014 (6th Cir. 1975). As the Court of Appeals noted, "this ordinance selects for special treatment particular business enterprises which fall within the general business classifications permissible under zoning laws and classifies them as regulated uses solely by reference to the content of the constitutionally protected materials which they purvey to the public." 518 F.2d at 1020.

MPAA believes that the judgment of the Court of Appeals should be affirmed. We are of course mindful of the

[4] The District Court did, however, invalidate a separate provision which prohibited the establishment of adult bookstores, adult motion picture theatres, adult "mini" motion picture theatres and certain kinds of cabarets "within 500 feet of any building containing a residential, dwelling or rooming unit." The District Court's decision with respect to this provision was not appealed. (See Brief of Petitioners, page 10.)

Following the District Court's ruling, the 500-foot provision was amended to prohibit the establishment of adult bookstores, adult motion picture theatres, adult "mini" motion picture theatres and certain kinds of cabarets "within 500 feet of a Residentially Zoned District." (See Petition for Certiorari, Appendix I, page 87.) We note, somewhat curiously, that Petitioners have asked this Court to pass on the constitutionality of the 500-foot provision, as amended. (See Brief of Petitioners, page 63.) The amended provision did not exist when these cases were commenced, was not before either of the courts below, and of course is not properly before this Court.

However, the same definitions of "Adult Book Store," "Adult Motion Picture Theater" and "Adult Mini Motion Picture Theater" apply to the 1,000-foot provision and to the 500-foot provision, both in its original form and as amended. Accordingly, any decision by this Court with respect to these definitions will clearly have an effect on the 500-foot provision, as amended, even though it is not before the Court as such.

fact that governments possess broad zoning power, *Village of Belle Terre* v. *Boraas,* 416 U.S. 1 (1974), and that it was pursuant to this power that the City of Detroit adopted the provision which is under review here. Nevertheless, a government's exercise of the zoning power is still "[s]ubject to specific constitutional limitations." *Berman* v. *Parker,* 348 U.S. 26, 32 (1954). It is MPAA's view in these cases that, considering the interests which Detroit has advanced in support of the 1,000-foot provision, the ordinance's definition of the "adult" motion picture theatres to which it applies "is fatally overinclusive in some respects and fatally underinclusive in others." *Erznoznik* v. *City of Jacksonville,* 422 U.S. 205, 218 (1975) (concurring opinion of Douglas, J.).

Although "the zoning approach" to content control has received considerable public attention,[5] there are very few extant examples of such measures. Besides Detroit, the City of Dallas prohibits "adult" motion picture theatres, or the exhibition of individual "adult" motion pictures, within 1,000 feet of any church, school or residential district;[6] the City of Boston confines "adult" bookstores and

[5] See, e.g., "Islip is Planning to Establish An 'Adult-Entertainment Zone'," *The New York Times,* October 16, 1975, page 1, columns 1-2; page 29, columns 1-4; "Islip Drops Plan for Pornography Zone," *The New York Times,* October 20, 1975, page 1, columns 2-4; page 18, columns 4-5.

[6] Dallas City Code § 46-9.2 makes it unlawful to operate "as an adult moving picture theatre or adult moving picture show, any moving picture theatre or moving picture show within 1,000 feet of a church or a public or private school accredited by the State of Texas or by a nationally recognized accrediting agency designated by the United States Office of Education or within 1,000 feet of a district zoned for residential use under the Comprehensive General Zoning Ordinance of the City of Dallas. 'Adult moving picture theatre' for purposes of this article means any moving picture theatre which excludes minors by reason of age without regard to whether such minors are accompanied by parent, guardian, husband or wife. 'Adult moving picture show' for purposes of this article means any moving picture

entertainment establishments to a special "Adult Entertainment District";[7] and Fairfax County, Virginia, employs a slightly varied combination of the Detroit and Dallas approaches.[8] Thus, three altogether separate and distinct types of *geographic* limitations have already emerged as facets of the zoning approach: anti-"clustering" (Detroit), anti-"proximity" (Dallas) and confine-

show which excludes minors by reason of age without regard to whether such minors are accompanied by parent, guardian, husband or wife. 'Minor' for purposes of this article means a person younger than 17 years." (Section 46-9.2 was added to the Dallas City Code by Dallas City Ordinance No. 14834, which was adopted on March 10, 1975, and became effective immediately.)

Copies of the Dallas ordinance discussed in this footnote and the Boston and Fairfax County ordinances discussed in footnotes 7 and 8, *infra*, are being filed with the Clerk of this Court simultaneously with the filing of this Brief, and are also being furnished to counsel of record for the parties to these cases simultaneously with the service of this Brief.

[7] Boston Zoning Code, Amendment No. 38, and Zoning Districts—City of Boston, Map 1—Boston Proper, Amendment No. 130, create an "Adult Entertainment District" and confine all new "adult" bookstores and entertainment establishments, including motion picture theatres, to this District. An "adult" bookstore or entertainment establishment is one which "customarily . . . exclude[s] any minor by reason of age as a prevailing practice." (The amendments creating the "Adult Entertainment District" were adopted by the Zoning Commission of the City of Boston on November 14, 1974, were approved by the Mayor on November 27, 1974, and became effective on the latter date.)

[8] On December 15, 1975, the Board of Supervisors of Fairfax County, Virginia, adopted an "emergency amendment" to the County's zoning code under which "Adult Book Store[s]" and "Adult Mini Motion Picture Theatre[s]" may not be established so as to abut residentially zoned or residentially used property, or within 1,000 feet of any church or school. In addition, no two such "adult" bookstores or theatres may be located within 1,000 feet of each other. The Fairfax County ordinance defines "adult" in essentially the same manner as the Detroit ordinance under review in the instant cases.

ment (Boston). This is a nascent area, moreover, in which there is very little case law.[9]

Accordingly, it is our view that it would be premature for this Court to rule on the constitutional propriety of one or more of the above types of *geographic* limitations "un-

[9] Besides the instant cases, we are aware of only two others which have considered the zoning approach to content control.

In *Sanders* v. *State*, 231 Ga. 608, 203 S.E.2d 153 (1974), the Supreme Court of Georgia held unconstitutional a state statute and a DeKalb County, Georgia, ordinance which prohibited the operation of "adult" bookstores or motion picture theatres "within 200 yards of any church, church book store, public park, public housing project, hospital, school (public or private), college, recreation center or private residence." The statute and ordinance defined "adult bookstore" to mean "any comercial establishment in which is offered for sale any book or publication, film or other medium which depicts nudity or sexual conduct." They defined "adult movie house" to mean "any movie theater which on a regular, continuing basis shows films rated X by the Motion Picture Coding Association of America [sic], or any movie theater which presents for public viewing on a regular, continuing basis so-called 'adult films' depicting sexual conduct." (The terms "sexual conduct" and "nudity" were further defined, but the reach of the statute and ordinance clearly was not limited to obscenity.)

The same Georgia statute and a separate but apparently identical local ordinance were involved in *106 Forsyth Corporation* v. *Bishop*, 362 F.Supp. 1389 (M.D.Ga. 1972), *affirmed per curiam*, 482 F.2d 280 (5th Cir. 1973), *cert. denied*, 422 U.S. 1044 (1975). The District Court upheld the statute and ordinance (362 F.Supp. at 1392-1393), but the Court of Appeals expressed "no opinion" as to their constitutionality (482 F.2d at 281). The only question presented to this Court by the Petition for Certiorari (see page 2 thereof) was the constitutional permissibility of license revocation as a sanction in the First Amendment area. Of course, the District Court's decision in *Bishop* preceded the Supreme Court of Georgia's contrary decision in *Sanders* v. *State*, *supra*.

See also: *Kay* v. *White*, 286 F.Supp. 684 (E.D.La. 1968), holding unconstitutional a licensing ordinance which had been enforced in accordance with a municipal policy that "no movie house [shall] be given a permit where only adult films are shown and minors [are] denied admittance, this being discriminating [sic] and against public policy and good morals." Compare *Butler* v. *Michigan*, 352 U.S. 380 (1957).

der all circumstances and in the face of all kinds of regulation." *Bigelow* v. *Virginia*, 421 U.S. 809, 826 (1975). For example, a case in which government allowed but limited to certain locales the exhibition or sale of material which it could otherwise suppress completely, *Miller* v. *California*, 413 U.S. 15 (1973), would present constitutional considerations altogether different from those involved in the instant cases.

The Detroit ordinance under review here is hardly a model of clarity. A definition such as "material distinguished or characterized by an emphasis on matter depicting, describing or relating to 'Specified Sexual Activities' or 'Specified Anatomical Areas' " leaves considerable room for doubt as to exactly which motion pictures it applies. See *Grayned* v. *City of Rockford*, 408 U.S. 104, 108-109 (1972). Moreover, it is unclear from the ordinance whether a motion picture theatre becomes "adult" if it shows only one film of the defined type during the course of a year, or whether it becomes "adult" only if it shows such films on a "regular" basis.

Nevertheless, however unclear the ordinance may be in certain particulars, this is not a case which calls for abstention. Cf. *Railroad Commission* v. *Pullman Co.*, 312 U.S. 496 (1941). The ordinance is clearly intended to and does in fact apply to non-obscene material.[10] In this circumstance, there is no foreseeable state court construction which could obviate "the need for a federal constitutional ruling or otherwise significantly modify the federal claim."

[10] As Petitioners themselves put it: "Obscenity is not an issue in the case at bar. The dissemination of 'obscene' or 'pornographic' material may be, and is now totally prohibited in the City of Detroit. . . . In December of 1974 the City adopted an ordinance prohibiting pornography, based on the *Miller* guidelines." (Brief of Petitioners, page 22.)

Harris County Commissioners Court v. *Moore*, 420 U.S. 77, 84 (1975).

The effect of the Detroit ordinance on the exhibition of constitutionally protected motion pictures is anything but incidental.[11] Thus, if a motion picture theatre is located within 1,000 feet of two other "Regulated Uses" (e.g., a restaurant and a hotel), that theatre may not show non-obscene films which the ordinance defines as "adult." The Detroit ordinance will also effect the exhibition of constitutionally protected motion pictures in so-called "multi-screen units" (i.e., buildings which include two or more separate auditoria for the showing of films).[12] The question here is therefore not what Detroit alone may do, because "what [Detroit] may constitutionally do, so may other cities and States." *Interstate Circuit* v. *Dallas*, *supra*, at 684.

According to Petitioners, the ordinance under review here was adopted for "the sole purpose . . . of preserving the stability of neighborhoods."[13] Although it is difficult to pinpoint each and every separate interest which the City

[11] This Court's decision in *United States* v. *O'Brien*, 391 U.S. 367 (1968), is in any case completely inapposite here. *O'Brien* involved a criminal statute prohibiting certain conduct which may, in some situations, have had the effect of also *indirectly*, incidentally limiting speech. See also: *Konigsberg* v. *State Bar*, 366 U.S. 36, 50 (1961). By contrast, the Detroit ordinance under review here, however its purposes are characterized, *directly* prohibits certain speech.

Nor is this a case involving a reasonable regulation of "time, place, and manner," for the Detroit ordinance clearly is *not* "applicable to all speech irrespective of content." *Erznoznik* v. *City of Jacksonville*, *supra*, at 209.

[12] MPAA's Research Department estimates that there are about 15,000 commercial motion picture theatres in operation in the United States today. Of these, approximately 3,200 are included within multi-screen units—"duplexes," "triplexes," "quadraplexes," etc.

[13] Brief of Petitioners, page 11.

has advanced in support of the 1,000-foot provision, two general themes would appear to be fairly clear.

First, Petitioners contend that the ordinance was "enacted in response to complaints from residents and businessmen that the influx of 'adult' businesses in the City of Detroit was adversely affecting the surrounding business and residential districts, decreasing property values, driving away residents and businessmen, causing increase in crime, particularly prostitution, causing neighborhood decline and the resulting lack of neighborhood pride, and generally detracting from the 'quality of life' necessary to maintain a viable neighborhood." [14]

Second, Petitioners contend that the "Regulated Uses" category, in which adult motion picture theatres are included by the ordinance, is designed to prevent "the concentration of similar types of businesses which [are] not oriented to serve the needs of the immediate neighborhood, but primarily attract[ ] persons from without the surrounding community who [have] little or no concern for the maintenance of a viable neighborhood." [15]

Clearly, both of these general themes include constitutionally cognizable interests of government. *Village of Belle Terre* v. *Boraas, supra.* Nevertheless, in the instant cases the Detroit ordinance's definition of the "adult" motion picture theatres to which it applies is constitutionally overinclusive with respect to the first general interest and constitutionally underinclusive with respect to the second.

Overinclusiveness. The term "adult," standing alone, means different things to different people. The numerous uses of this term throughout the Record in these cases are wholly undifferentiated. See *Tinker* v. *Des Moines School*

[14] *Id.* at 8.

[15] *Id.* at 17.

District, 393 U.S. 503, 508 (1969). Indeed, many of the affidavits and letters introduced by the City in support of the 1,000-foot provision refer to establishments offering "pornography," [16] a category far more limited in scope than the material which the Detroit ordinance defines as "adult."

The ordinance under review here operates in an area in which "precision of drafting and clarity of purpose are essential." *Erznoznik* v. *City of Jacksonville, supra,* at 217-218. Yet, on the basis of the Record in these cases, any connection between the deleterious effects which the City is trying to prevent and the exhibition of those constitutionally protected films which the ordinance defines as "adult" is simply "too remote and conjectural to override the guarantee of the First Amendment." *DeGregory* v. *Attorney General of New Hampshire,* 383 U.S. 825, 830 (1966).

The suitability of a neighborhood environment for family life is of course a legitimate interest of government, but this Court has long since held that public areas cannot, consistently with the First Amendment, be sanitized to the point where they are "palatable to the most squeamish among us." *Cohen* v. *California,* 403 U.S. 15, 25 (1971).[17] We cannot and do not quarrel with Detroit's desire to promote and protect an environment suitable for family life—a desire with which we fully agree. However, we can and do quarrel with the City's attempt to achieve that goal "by

[16] See Brief of Petitioners, Appendix J, pages 22-23, 26, 30-31.

[17] The definition of "adult" under review here is based solely on the content of films shown *inside* enclosed motion picture theatres. The exterior facets of *all* motion picture theatres (marquees, billboards, and the like) "properly may be put in a class by themselves." *St. Louis Poster Advertising Co.* v. *City of St. Louis,* 249 U.S. 269, 274 (1919).

means which sweep unnecessarily broadly and thereby invade the area of protected freedoms." *NAACP* v. *Alabama*, 377 U.S. 288, 307 (1964).

Underinclusiveness. The purpose of the "Regulated Uses" category is to prevent the "clustering" of business establishments in excess of those required "to serve the needs of the immediate neighborhood."[18] To the extent that motion picture theatres may properly be included among "Regulated Uses," it would appear that the underlying rationale of this category applies to such theatres irrespective of the content of the non-obscene films which they exhibit. Certainly, on the basis of the Record in these cases, there are no "clear reasons" for the distinction which the ordinance draws between various types of constitutionally protected motion pictures. *Erznoznik* v. *City of Jacksonville*, *supra*, at 215. We can therefore only conclude that the designation of adult motion picture theatres alone as "Regulated Uses" is "strikingly underinclusive." *Id.* at 214. See also: *Police Department of Chicago* v. *Mosley*, 408 U.S. 92 (1972).

In sum, like the drive-in theatre ordinance which this Court invalidated in *Erznoznik*, the Detroit ordinance under review in the instant cases is obviously well-intentioned. But this is not enough. Considering the interests which the City has advanced in support of the 1,000-foot provision, it is our view that the ordinance's definition of the "adult" motion picture theatres to which it applies is constitutionally overinclusive in some respects and constitutionally underinclusive in others. The ordinance is therefore invalid on its face.

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[18] Brief of Petitioners, page 17.

Conclusion

For the reasons set forth above, the judgment of the United States Court of Appeals for the Sixth Circuit should be affirmed.

Respectfully submitted,

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BARBARA SCOTT
JAMES BOURAS
Attorneys for Motion Picture Association of America, Inc., Amicus Curiae

Certificate of Service

I hereby certify that I have served three copies each of this Motion for Leave to File Brief *Amicus Curiae* and Brief of Motion Picture Association of America, Inc. as *Amicus Curiae* upon counsel of record for each of the parties by depositing copies of said Motion and Brief in the United States Mail, properly addressed and with sufficient postage thereon to insure delivery first class.

Copies of this Motion and Brief were sent to the following:

Counsel for Petitioners: Maureen P. Reilly, Esq.; Assistant Corporation Counsel; City of Detroit; 1010 City-County Building; Detroit, Michigan 48226.

Counsel for Respondents American Mini Theatres, Inc. and Pussy Cat Theatres of Michigan, Inc.: John H. Weston, Esq.; Fleishman, McDaniel, Brown & Weston; 6922 Hollywood Boulevard; Suite 718; Hollywood, California 90028.

Counsel for Respondent Nortown Theatre, Inc.: Stephen M. Taylor, Esq.; Taylor and Rubin; 1650 First National Building; Detroit, Michigan 48226.

This ..... day of January, 1976.

.....

James Bouras
An Attorney for *Amicus Curiae*

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